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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 567.

JO VAN DER LOO, *Petitioner*,

v.

PAUL A. PORTER, PRICE ADMINISTRATOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS AND BRIEF IN SUPPORT THEREOF.

CHARLES W. ARTH,
JOHN L. LASKEY,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. ————.

JO VAN DER LOO, *Petitioner*,

v.

PAUL A. PORTER, PRICE ADMINISTRATOR.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES EMERGENCY COURT OF APPEALS.

The petitioner, Jo van der Loo, prays that a writ of certiorari issue to review the judgment of the United States Emergency Court of Appeals entered in the above case on September 5, 1946.

I.

STATEMENT OF MATTER INVOLVED.

This is a petition for certiorari to the United States Emergency Court of Appeals, to review, in the same manner as a judgment of a Circuit Court of Appeals as provided in Section 240 of the Judicial Code as amended, a

judgment of said United States Emergency Court of Appeals.

Said judgment dismissed petitioner's complaint brought in that Court under Section 204(a) of the Emergency Price Control Act of 1942 as amended, against the Price Administrator, Office of Price Administration, objecting to his denial of petitioner's protest brought under Section 203(a) of said Act to Revised Maximum Price Regulation No. 330 issued by said Price Administrator under said Act.

Said Regulation establishes ceiling prices for women's and misses' outerwear garments, which merchandise is dealt in by petitioner in her retail establishment in Washington, D. C. Petitioner contends that the Price Administrator has not correctly interpreted said Regulation as applied to her, and alternatively that if the Price Administrator's interpretation is correct the Regulation is invalid.

II.

JURISDICTION.

The judgment of the United States Emergency Court of Appeals was entered on September 5, 1946 (R. 49). This petition is filed October 5, 1946.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 204(d) of the Emergency Price Control Act of 1942, as amended (Act of January 30, 1942, c. 26, Title III, Section 306, 56 Stat. 37.)

III.

QUESTIONS PRESENTED.

1: Does the United States Emergency Court of Appeals have the right to refuse to pass upon an administrative interpretation of a Regulation on the sole ground that, subsequent to the protest of this interpretation, enforcement proceedings were instituted in the District Court?

2: Is a Regulation which unreasonably requires the selling of goods at prices less than their lawful cost to the seller a valid Regulation?

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

Petitioner contends that the petition for a writ of certiorari to the United States Emergency Court of Appeals should be granted, for the following reasons:

1: Said United States Emergency Court of Appeals in its decision herein (R. 45) has not given proper effect to an applicable decision of this Court, in the following case:

> *Collins et al.* v. *Porter,* U. S. , 90 L. ed. 799 (advance sheets), decided April 22, 1946)

2: The decision of the United States Emergency Court of Appeals herein (R. 45) is in conflict with its decisions in the following cases:

> *Marlene Linens* v. *Bowles,* 144 F. 2d 874 (E. C. A. 1944);
> *Alan Levin Foundation* v. *Bowles,* 152 F. 2d 467 (E. C. A. 1945);
> *Conklin Pen Company* v. *Bowles,* 152 F. 2d 764 (E.C.A. 1946).

3: Said United States Emergency Court of Appeals in its decision herein (R. 45) has decided an important question of federal law which has not been, but should be, settled by this Court.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Emergency Court of Appeals, commanding that court to certify and to send to this Court for its review and determination, on a day

certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 318, *Jo van der Loo, complainant,* v. *Paul A. Porter, Price Administrator,* and that the judgment of said United States Emergency Court of Appeals in said case may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

JO VAN DER LOO,
By CHARLES W. ARTH,
JOHN L. LASKEY,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

No. .....

JO VAN DER LOO, *Petitioner,*

v.

PAUL A. PORTER, *Price Administrator.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the United States Emergency Court of Appeals is as yet unreported officially; it was filed September 5, 1946 (.... F. 2d ....). It is found in the Record on pages 45 to 48, inclusive.

The opinion of Paul A. Porter, Price Administrator, was filed February 12, 1946; it is found in the Record on pages 23 to 27, inclusive.

II.

JURISDICTION.

The judgment of the United States Emergency Court of Appeals was entered on September 5, 1946 (R. 49). This petition is filed October 5, 1946.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 204(d) of the Emergency Price Control Act of 1942, as amended (Act of January 30, 1942, c. 26, Title III., Sec. 306, 56 Stat. 37).

III.

STATEMENT OF THE CASE.

Petitioner, Jo van der Loo, is a retail dealer in women's and misses' apparel, doing business at 1739 Connecticut Avenue, N. W., Washington, D. C.

The Regulation protested is Revised Maximum Price Regulation No. 330, issued September 13, 1944, under the provisions of the Emergency Price Control Act of 1942, as amended.

Said Regulation (Section 2, App. 29) established as maximum prices which might be charged for women's and misses' outerwear those prices at which each individual seller made the largest number of deliveries of garments of the same cost and in the same category during the base period from August 1 to December 31, 1941. Each seller was required to file a pricing chart (Section 3, App. 29) showing, by category, each cost price paid for garments sold during that period and the price at which the largest number of garments in each cost price line was delivered, and then to calculate the resulting "percentage markup" taken on each such selling price. These "percentage markups" established the retailers "ceiling price" for each item. In each category, for cost lines not handled during the base period, the Regulation allowed the average markup for any higher than the highest on the chart, the markup for the lowest item for any lower in cost than the lowest shown, and the markup of the next lower cost line for any between the highest and the lowest. (Sections 3, 4, App. 29-35).

In 1938 petitioner established her retail shop for the sale of women's and misses' outerwear garments. Because of inexperience, she became overstocked with garments of

various cost lines not properly selected for her type of establishment and as a result, during the summer of 1941 she found herself with an unbalanced and slowly-moving inventory. On advice of an expert in retail sales of women' and misses' apparel, she initiated a reduced price sale to liquidate her then inventory at prices reduced from 35% to 60%, in order to re-stock with merchandise better selected for her type of trade. The period covered by said sale extended from the last few days in July until December 29, 1941, a period practically coincident with the base period long thereafter selected by said Regulation No. 330. Many items were disposed of at prices less than cost, others at markups from 2 to 13 per cent. from cost, and a number of other garments were sold at reduced prices because damaged or soiled. During said period she sold 548 garments covered by said Regulation, over 200 of which were at greatly reduced prices. (R. 2, 16). In many cost lines, such reduced price sales were the only sales, or the majority of sales, made during the base period. Said sales did not represent usual or customary sales, or reflect the structure of retail markups in a typical selling period, but represented an emergency measure, made necessary by the condition of the petitioner's inventory.

The above facts were admitted by the answer of the Price Administrator (R. 33-34, 40).

In connection with the preparation and filing of her pricing chart (R. 28-29) under said Regulation, petitioner reported to the District of Columbia Office of the Office of Price Administration the facts above stated, asked that office for answers to certain specific questions, and requested an interpretation of said Regulation which would afford her relief from the requirement of selling many of her usual cost lines of merchandise at prices below the normal markup prevalent in the industry and in many instances below cost. In reply to said request, said Office of Price Administration placed an interpretation upon said Regulation requiring petitioner to accept said below-cost

sales and sales of damaged or soiled merchandise, made outside the usual course of business, as establishing ceiling prices for all subsequent sales. (R. 7-10, 34, 40).

As a result of the foregoing, petitioner's pricing chart under said Regulation, prepared pursuant to such interpretation of the provisions of said Regulation, contains in several categories a number of cost lines in which, instead of applying a "markup" to the cost of a garment to be priced, she is required to take as her ceiling price for all future sales the markdown price, which in many cases is below the cost of the item to her, and in others so slightly above cost as to make the handling of such garments unprofitable (R. 34-35).

On June 13, 1945, petitioner filed with the Price Administrator, under the provisions of Section 203(a) of said Act, her protest of said Regulation No. 330 as interpreted and applied to her by said Price Administrator. Said protest was assigned Docket No. 1330-19-P (R. 1). Thereafter petitioner furnished additional evidence in affidavit form in connection with her said protest (R. 13-21).

On February 12, 1946, the Price Administrator entered in said cause an order denying the protest and filed an opinion in support of said order (R. 22-27). (Date of service and effective date of judgment was February 13, 1946 —R. 41-43).

On March 15, 1946, petitioner as complainant filed in the United States Emergency Court of Appeals, under the provisions of Section 204(a) of said Emergency Price Control Act of 1942, as amended, her complaint specifying her objections to said denial of her protest, and seeking a determination by said Emergency Court of Appeals that said Regulation No. 330 as interpreted and applied by said Price Administrator to her business is invalid, and further seeking an interpretation and application of said Regulation which will be fair and equitable and will effectuate the purpose of said Act. (R. 31).

On September 5, 1946, said United States Emergency Court of Appeals entered an order dismissing petitioner's said complaint, and filed an opinion in support of said order (R. 45-49).

This petition is filed under Section 203(d) of said Emergency Price Control Act of 1942, as amended, for a review of said judgment of the United States Emergency Court of Appeals.

Although not a part of the record herein, or of the record before the said United States Emergency Court of Appeals, certain proceedings in the District Court of the United States for the District of Columbia were mentioned in the pleadings before the Emergency Court of Appeals and are referred to in its opinion; and the action of said District Court in the proceedings before it was by said Emergency Court of Appeals apparently taken as one of the bases for its decision and for the judgment here involved. As an explanation of the references to said District Court proceedings appearing in the opinion (R. 45-48) petitioner recites the following additional facts:

After petitioner filed with the Price Administrator her protest of Revised Maximum Price Regulation No. 330 as interpreted and applied to her by the Administrator (R. 1-12), and on July 26, 1945, said Administrator filed with the District Court of the United States for the District of Columbia, in Civil Action No. 29,900, a complaint for injunction and treble damages against petitioner as defendant, charging her with violations of said Regulation. Before the Price Administrator passed on said protest, the District Court on December 11, 1945, filed a memorandum opinion, and on January 3, 1946, entered judgment, restraining petitioner as defendant from violation of said Regulation, but finding that she had acted in good faith, and denying the damages claimed against her. Petitioner as defendant within five days after said judgment moved for a stay thereof, under Section 204(e) (2)(iii) of said Emergency Price Control Act as amended (App. 26-28),

during pendency of a proceeding to be instituted by her in the Emergency Court of Appeals under Section 203(d) (App. 25) of said Act because of the undue delay of the Administrator in disposing of her protest. Said District Court on March 7, 1946, granted such stay, and, as required by Section 204(e) (2) of said Act, issued a temporary injunction enjoining, during the period of the stay, violations by petitioner as defendant of any provision of said Regulation. Meantime the Administrator had denied the protest, and the proceedings in the Emergency Court were instituted to review that denial.

IV.

SPECIFICATION OF ERRORS TO BE URGED.

1: The United States Emergency Court of Appeals erred in refusing to pass upon the administrative interpretation of the Regulation.

2: The United States Emergency Court of Appeals erred in failing to hold that the Regulation as interpreted by the Price Administrator was invalid.

3: The United States Emergency Court of Appeals erred in dismissing the complaint.

V.

ARGUMENT.

Summary of the Argument.

Point A.

The United States Emergency Court of Appeals was in error in refusing to pass upon the Price Administrator's interpretation of the Regulation. In so doing, it in effect refused to pass upon the validity of the Regulation as interpreted, and so refused to perform the function which Congress directed it to perform.

Point B.

The interpretation of the Regulation contended for by the Price Administrator is not a proper interpretation, since the entire theory of the Regulation as drawn is the perpetuation of customary markups existing during the base period, and not the freezing of below-cost selling prices resulting from unusual circumstances. The elimination of below-cost and abnormally low sales from the pricing chart would not free any cost lines from price control, since the Regulation provides means for pricing all cost lines.

Point C.

As interpreted and applied by the Price Administrator, the Regulation is invalid, not being in accordance with law, and being arbitrary and capricious, in that as interpreted and applied it would compel petitioner either to refrain from dealing in a substantial number of cost lines of garments within the normal scope of her business, or to sell those cost lines at a price below the lawful cost to her. In either event, the Regulation as interpreted and applied imposes upon petitioner and others similarily situated a competitive disadvantage not necessary to effectuate the purposes of the Act.

Point D.

The failure of the Regulation to provide any adjustment provisions applicable to situations similar to petitioner's is unnecessary and arbitrary. The inclusion of adjustment provisions in other Regulations with a similar scope and coverage establishes that the inclusion of such provision in this Regulation would not be administratively impossible, or impose unnecessarily severe burdens on the Price Administrator.

ARGUMENT.

A. The relief sought by petitioner in the Emergency Court of Appeals was a review, under Section 204(a), of her protest filed with the Price Administrator under Section 203(a), of the Emergency Price Control Act of 1942 as amended.

Petitioner sought in the Emergency Court of Appeals, under Section 204(a) of the Emergency Price Control Act of 1942 as amended, a review of the Administrator's denial of her protest, and had the protection of the District Court's action, under Section 204(e) (2) of said Act, in staying its judgment in the injunction case, pending complaint to the Emergency Court. Said stay was requested, under Section 204(e)(2)(ii), during the pendency of petitioner's protest, to allow a proceeding under 203(d) for an order to require the Administrator to act on the protest; meantime he denied it, and therefore the stay when granted came under the provision of Section 204 (e) (2)(iii). But petitioner's right to proceed under Section 204(a) was not and could not be limited by events occurring subsequent to the institution of her protest. This Court has held in *Collins et al.* v. *Porter,* .... U. S. ...., 90 L. Ed. 799 (advance sheets), No. 393, decided April 22, 1946, that the remedies by procedure under Sections 204(a) and 204(e) are cumulative and not alternative.

The record of these proceedings in the Emergency Court of Appeals shows that the requirements of Section 204(a) are followed in the complaint as well as in the further proceedings in that court. Said record includes the complaint of petitioner as a person aggrieved by a denial of a protest (Sec. 204(a) of the Emergency Price Control Act of 1942 as amended) (R. 31); the transcript of the proceedings before the Price Administrator on the protest (R. 1-30), and the Administrator's answer to the complaint (R. 39-41). Said record contains no part of the proceedings in the District Court in the injunction suit under Section 205 of said

Act, and no indication of application for leave to introduce additional evidence (Sec. 204(a), App. 24-25). As part of the historical background of the situation involving petitioner, the Administrator, and Revised Maximum Price Regulation No. 330, petitioner's complaint recited the Administrator's suit for injunction and damages filed after the filing of her protest, the judgment of the District Court enjoining violation of the Regulation but refusing to assess damages, and the stay of that judgment on petitioner's application pending her proceeding in the Emergency Court of Appeals with a complaint (R. 31-32). The Administrator's answer (R. 40) admitted those allegations of the complaint and affirmatively stated that the Administrator had appealed from that portion of the judgment which denied treble damages and petitioner had appealed from that portion which granted the injunction (R. 40).

The District Court judgment was, as recited in the pleadings herein, taken by both parties by appeal to the United States Court of Appeals for the District of Columbia, and as noted in the opinion (R. 46) those appeals are now pending.

Only one proceeding was before the Emergency Court for review, as pointed out in the Administrator's brief in that court, and that was petitioner's complaint to review the denial of her protest, which objected to the Administrator's interpretation and application of the Regulation and contended that as so interpreted and applied to her the Regulation was invalid. No review was sought to the Emergency Court of the District Court's action; such review, under Section 204(e)(1), was not available to petitioner, since it may be taken only by leave of the District Court after its finding of good faith of the complainant and in a case in which a protest has not been filed.

The fact that the District Court granted a stay pending action in the Emergency Court does not bring before the latter court any of the actions of the former. The statute provides for stays to suit the varying situations, and it

also requires a temporary restraining order enjoining violations of any provision of the Regulation involved, during the period of the stay.

The Emergency Court of Appeals in its opinion refuses to interpret the Regulation, on the assumption that its action would not bind the District Court and would leave petitioner in a dilemma. Such is not the fact. As the record in this case shows, the Price Administrator's interpretation of the Regulation is in effect an order of the Price Administrator and becomes a part of the Regulation essential to a consideration of questions arising from the application of the Regulation to petitioner's business. Hence if the Emergency Court decided that the interpretation contended for by the Administrator was invalid, it would to that extent find the Regulation as interpreted to be invalid; that decision would bind the District Court and under the terms of the Emergency Price Control Act the enforcement proceeding pending upon such invalid interpretation would have to be dismissed and any judgment previously entered vacated.

The interpretation of the Regulation, therefore, is under the exclusive jurisdiction of the Emergency Court, and it was wrong in renouncing its jurisdiction in favor of the District Court.

The Emergency Court of Appeals has apparently assumed that it has before it for consideration and review both the action of the United States District Court for the District of Columbia and the action of the Price Administrator on petitioner's protest, in the two separate proceedings involving petitioner.

The opinion recites the action in the protest proceedings, and also sets out the filing of the suit for injunction and treble damages, the filing of the court's memorandum opinion (not mentioned in the Record) and the issuance of a permanent injunction against "further" violations of the Regulation—(there is no record basis for the use of the word "further"). It recites the appeals to the United

States Court of Appeals for the District of Columbia, "where they are now pending"; and apparently having in mind a proceeding under Section 204(e)(1), says the District Court granted "leave within thirty days" to file a complaint in the Emergency Court. Then from its apparent assumption as to the contents of the memorandum opinion and injunction, it concludes that the District Court had passed upon the interpretation of the Regulation and rejected petitioner's contention on that point, although it found petitioner had acted in good faith; and it assumes without any basis in the record that the District Court found that petitioner herein, defendant in the District Court, had made sales above established ceilings. (R. 46).

The Emergency Court then cites its former decision in *Conklin Pen Company* v. *Bowles*, 152 F. 2d 764 (E. C. A. 1946) as authority for holding:

> "* * * where a District Court in an enforcement proceeding has interpreted a regulation as being applicable to one who later complains to this Court that the regulation is invalid, we must accept the District Court's interpretation."

That use of language from the *Conklin Pen Company* case not only ignores the statements of this Court that procedures for review are cumulative and not alternative (*Collins et al.* v. *Porter, supra*), but also takes that language out of its context in the *Conklin* case, where it was used in describing a proceeding under Section 204(e) (1) of the Act. The Court said (152 F. 2d 766):

> "* * * where, as in this case, a protestant to whom a regulation has been construed by the Administrator to be applicable, asserts that if applied to him the regulation is invalid and at the same time contends that properly construed it is inapplicable to him, we think that he has the right to have the question of the proper meaning and interpretation of the protested regulation passed on in the protest proceedings and on review in this court. * * *

"A case filed in this court under Section 204(a) is a judicial review of the Administrator's action in denying the protest. It would be strange indeed if in such a proceeding the reviewing court were bound by the determination of the officer whose action is being reviewed as to the meaning of his regulation or order. For those acts have the force of law and their construction involves a question of law just as much as does the interpretation of a statute. Moreover, it is a question which may involve the standing of the complainant to maintain his suit. It is for these reasons that this court has held that in such a case we have power to determine whether the regulation under attack may fairly be interpreted as applying to the complainant before we decide the questions of validity which he raises. Alan Levin Foundation v. Bowles, F. 2d (E. C. A. 1945).

"A case brought to this court under Section 204 (e) (1) of the Act is in quite a different category. Such a case is not in any true sense an appeal from an action of the Price Administrator but, on the contrary, is merely ancillary to another suit which has been brought against the complainant in another court. In such a case the jurisdiction of the Emergency Court of Appeals is invoked by the complainant only with leave of the court in which the litigation is pending. It is invoked primarily for the purpose of enabling the complainant to establish the invalidity of the regulation involved in that litigation as a defense to be presented in that court. See Section 204 (e) (2) of the Act. Except for the prohibition of Section 204 (d) the defense could and would have been established in the primary court. But the complainant still has full opportunity to raise in that court the question of the applicability of the regulation and have it there judicially decided. Accordingly we have held in such a case that this court will accept the construction which the enforcement court has placed upon the regulation in question and will consider merely its validity as thus interpreted. Collins v. Bowles, —— F. 2d. —— (1946)."

Collins et al. v. *Bowles,* 152 F. 2d, 760, (decided by the Emergency Court of Appeals January 10, 1946), cited as upholding the opinion, was considered by this Court in its

review on certiorari of the decision of the Emergency Court of Appeals in an earlier case brought there by the same complainants—*Collins et al.* v. *Bowles*, — U. S. —, 90 L. ed. 799, *supra*.

In the *Collins* case, the Administrator brought suit for treble damages, which suit was still pending; thereafter petitioners sought by protest to the Administrator under Section 203(a) of the Act to have the Regulation declared invalid or inapplicable. The Administrator dismissed the protest; petitioners went to the Emergency Court of Appeals, which dismissed the complaint without opinion, and this Court granted certiorari. Meantime petitioners obtained leave of the trial court in the treble damage case to file a complaint with the Emergency Court under Section 204(e) of the Act, and the Emergency Court on January 10, 1946, (152 F. 2d. 760) sustained the validity of the Regulation, but refused to pass upon its applicability to petitioners. On this Court's review on certiorari of the first decision it was said (p. 801):

> "The petitioner in this case had a right to have his protest considered by the Administrator and, in case of denial, to resort to the Emergency Court of Appeals. The fact that Congress in 1944 gave a limited opportunity to go to the Emergency Court by leave of the District Court before which an enforcement proceeding is pending, Sec. 204(e), neither repealed nor qualified the protest proceeding originally designed by Section 203(a). The two modes of securing a hearing on the validity and applicability of the price regulation are cumulative and not alternative. * * *
>
> "Judgment reversed."

Petitioner's case stands in somewhat better position than the *Collins* case, since her protest was filed before the Administrator instituted his treble damage proceeding, now pending in the Court of Appeals, the decree of the District Court having been stayed.

B. The interpretation advanced by the Administrator is not a proper interpretation of the Regulation.

Revised Maximum Price Regulation No. 330 as drawn does not require sales of goods, lawfully purchased under price control, at prices below cost to the seller. The Administrator by interpretation has sought to amend the Regulation and include such a requirement. This he should not be permitted to do.

The Regulation provides that one subject to it should find his ceiling prices

> "by calculating the markup which (he) took on garments (he) delivered during the base period and then applying that markup to the cost of the garment (he is) pricing." (Section 2).

The Regulation further states under Section 3:

> "In order to price under this Regulation you must have a pricing chart",

and gives with particular detail the items which must be contained in the chart. One very essential item to be contained in the chart is

> "the percentage markup taken on each selling price."

Thus it appears that items sold below cost during the base period should not and cannot under the terms of the Regulation be included in the pricing chart. It would be entirely consistent with the Regulation to omit those items entirely from the pricing chart, as in the case of lines in which no sales were made during the base period—to treat those sales as not constituting a basis for fixing future selling prices. This does not mean that such items would be sold without the restrictions of price control. The Regulation does not contemplate that every cost line or item sold must be one for which there was a comparable sale during the base period, but it provides rules for pricing, under the

terms of the Regulation, any and all cost lines and items not appearing on the chart. (App. 29-35).

The interpretation for which petitioner contends is further compelled by the entire theory of the Regulation, which is that of applying a "markup" customary during the base period. The Regulation throughout uses the terms "markup", "percentage markup" and terms of similar import, referring to the method of arriving at a selling price by applying a percentage markup over cost.

Petitioner's situation is similar to, though not the same as, the complainant's situation in *Conklin* v. *Bowles, supra.* The Regulation has been interpreted to her, and her contention is, not that as properly interpreted the Regulation is inapplicable to her, but that, as properly interpreted, the Regulation does not compel her to conduct her business in the manner contended for by the Price Administrator.

To adopt the Administrator's interpretation would be artificial and contrary to the plain intendment of the Regulation and the Act.

C. As interpreted by the Price Administrator, the Regulation is invalid, in that it arbitrarily places the petitioner at a competitive disadvantage with other retailers.

Under the Price Administrator's interpretation, petitioner is told in so many words that she must handle certain cost lines of garments at a loss or refrain from handling those cost lines at all. Nowhere does it appear that these cost lines are not normally purchased and sold by competing retailers, and nowhere does it appear that the purchase by petitioner of these cost lines would be at prices other than the lawful ceiling prices of her suppliers.

While such an interpretation seeks to assume the guise of reasonableness by giving the complainant alternative courses of conduct, it is in fact unreasonable, arbitrary and capricious, in that each alternative precludes her participation in a legitimate field of merchandising, even though she

seeks to participate in such field in a manner consistent with the purposes and objectives of the Price Control Act. Such a result is not required by the Act, and has not been approved by the Emergency Court of Appeals nor by this Court.

In *Consolidated Water Power & Paper Co.* v. *Bowles*, 146 F. 2d. 492 (E. C. A. 1944) the Company protested a regulation, charging that if the Administrator's interpretation was correct, then the Regulation was invalid. The Administrator denied the protest, and the Company brought a declaratory judgment suit in the District Court and also filed a complaint in the Emergency Court challenging the interpretation of the Regulation and attacking its validity as so interpreted. The declaratory judgment suit was dismissed, and thereafter the Emergency Court considered and accepted the Administrator's interpretation, and found that the Regulation as so interpreted as invalid.

The Emergency Court in *Flett* v. *Bowles*, 142 F. 2d 559 (E. C. A. 1944) held the provision in question subjected complainant to a competitive handicap,

> "which was not characteristic of the industry prior to price control, and which, so far as this record discloses, is wholly unnecessary for the effectuation of the purposes of the Act."

It therefore declared the Regulation arbitrary and discriminatory and not in accordance with law.

In *Hillcrest Terrace Corporation* v. *Brown*, 137 F. 2d 663, 667, (E. C. A. 1943) complainant's rents at the rent-freezing period were temporarily reduced by a real estate tax exemption. The Administrator denied the protest seeking amendment of the adjustment provisions of the Regulation, none of which exactly fitted the state of facts. On complaint to the Emergency Court, it was held that the rents charged during that period were not the product of general market conditions of supply and demand on that date, and remanded the case to the Administrator to devise an amendment which would cover the situation.

From the facts appearing in the opinions, neither of the three cases last cited appears to involve a concern which was a representative of a class, or a regulation which itself had dealt with individual concerns. They each appear to be cases in which the Administrator's interpretation of a regulation and its application to a complainant was arbitrary and capricious.

Petitioner has suffered serious inconvenience and financial hardship in her business as the result of the Administrator's interpretation of Regulation 330, under which she is required to accept as her ceiling price, for a number of lines, prices less than the cost under price control, and she is precluded from handling those usual and customary cost lines of the trade which are available to and handled by her competitors at normal profitable markups.

The Emergency Court's opinion criticises the fact that the net profits of petitioner's business as a whole during the time the Regulation has been in effect are in excess of those in previous years (R. 48). A new business started in 1938 would not make in its earlier years the profits to be expected after it had become established and a clientele had been built up. Her highest profit was a little over $9,000.00 a year; her net profit for the six months ending June 30, 1945, $3,624.35. Those figures are before deduction of any compensation for the services of petitioner, who does all the buying, and as active supervising manager devotes her entire time to the operation of the business (R. 15, 17-21).

D. The failure of the Regulation to include any adjustment provision renders it unreasonable and arbitrary.

At the times of the filing of the protest and the complaint herein the Regulation contained no provision for adjustment. Thereafter the Price Administrator on April 11, 1946, issued Amendment 5 to the Regulation, effective April 16, 1946, providing a method for adjustment of abnormally low markups and for the exclusion of below-cost sales in calculating average markups for the purpose of the amend-

ment. In so far as petitioner seeks prospective relief, that amendment might be construed as extending it to her. However, she is here faced with a situation with which the Emergency Court dealt in the case of *Montgomery Ward & Co., Inc.* v. *Bowles*, 146 F. 2d 492 (E. C. A. 1944). In that case the Emergency Court continued with the consideration of a complaint protesting the highest price line provision of this very Regulation, even though the Stabilization Extension Act of 1944 has compelled the elimination of such provision. The reason for continuation was that enforcement proceedings based upon the objectionable feature of the Regulation were pending. That situation is present here, since we have enforcement proceedings pending in the United States Court of Appeals for the District of Columbia, in which the allegations of violations contended for by the Price Administrator are based upon the protested Regulation as interpreted and applied by him before the effective date of Amendment 5 to the Regulation.

Amendment 5 conclusively shows that adjustment provisions to Regulation 330 are administratively feasible and are consistent with the theory and purposes of the Act and the Regulation.

Even without that amendment, however, the Administrator has publicly acknowledged that such adjustment procedure is not only feasible but necessary to prevent unfairness and inequity. Maximum Price Regulation 580 is similar to Revised Maximum Price Regulation 330 in that it deals with apparel, is of the same general type, and covers the same or similar retailers; it requires a pricing chart, has a base date, and determines ceilings by the application of pricing rules to the pricing chart. Amendment 1 to Maximum Price Regulation 580, issued March 30, 1945, effective April 4, 1945, provides in part:

> "(i) To avoid the distortion caused by markdowns you may list as your offering price for an article either the price at which you actually offered it on the base date, or the price at which you offered that article when you first offered it for sale. However, if you can

not determine the price at which you offered the article when you first offered it for sale, you may ignore that article in preparing your chart."

In the Statement of Considerations accompanying this amendment the Administrator acknowledged the disruptive effect upon sellers, subject to the regulation, of occasional markdowns of merchandise because it was damaged, soiled or obsolete, or because it was out of season, or for other reasons. The Administrator further recognized that on the base date some sellers were engaged in store-wide sales, and speaking of this circumstance he said it was clear that the provisions of the Regulation arbitrarily penalized a few individuals. Those admissions of the Price Administrator, belated as they may be, are sufficient for this division of the argument.

VII.

CONCLUSION.

It is respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the United States Emergency Court of Appeals may be required to give proper effect to the applicable decisions of this Court, and that the decisions of that court may be settled and harmonized; and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Emergency Court of Appeals and finally reverse it.

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APPENDIX.

Emergency Price Control Act of 1942, as amended.

SEC. 203. (a) At any time after the issuance of any regulation * * * any person subject to any provision of such regulation * * * may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. * * * Within a reasonable time after the filing of any protest under this subsection, but in no even more than thirty days after such filing, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. * * *

(d) Any protest filed under this section shall be granted or denied by the Administrator, or granted in part and the remainder of it denied, within a reasonable time after it is filed. Any protestant who is aggrieved by undue delay on the part of the Administrator in disposing of his protest may petition the Emergency Court of Appeals, created pursuant to section 204, for relief; and such court shall have jurisdiction by appropriate order to require the Administrator to dispose of such protest within such time as may be fixed by the court. If the Administrator does not act finally within the time fixed by the court, the protest shall be deemed to be denied at the expiration of that period.

SEC. 204. (a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation * * * protested be enjoined or set aside in whole or in part. * * * Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation * * *, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided*, That the regulation * * * may be modi-

fied or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation * * *, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which * * * could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation * * * as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

* * *

(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, * * *.

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of * * * any provi-

sion of any such regulation * * *. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

(e)(1) * * * within five days after judgment in any civil * * * proceeding, brought pursuant to section 205 involving alleged violation of any provision of any regulation or order * * *, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203(a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 involving an alleged violation of any provision of any such

regulation, order or price schedule, the court shall stay the proceeding—

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provision;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205, setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this

subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205; nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

* * *

(c) The district courts shall have jurisdiction of criminal proceedings * * * and * * * of all other proceedings under section 205 of this Act. * * *

(d) No person shall be held liable for damages or penalties in any Federal * * * court, on any grounds for or in respect of anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation, order, price schedule, requirement, or agreement thereunder, * * * notwithstanding that subsequently such provision, regulation, order, price schedule, requirement, or agreement may be modified, rescinded, or determined to be invalid. * * *

Revised Maximum Price Regulation 330—Retailers' and Wholesalers' Prices for Women's, Girls', Children's and Toddlers' Outerwear Garments.

* * *

SEC. 2. *How to find your ceiling prices under this regulation.*—(a) *Explanation of rules.* You find your ceiling price under this regulation by calculating the markup which you took on garments you delivered during the "base period", and then applying that markup to the cost of the garments you are pricing. * * *

(c) * * * (2) * * * (i) The "base period" for retailers is the period between August 1 and December 31, 1941; * * *.

SEC. 3. *Pricing charts.* In order to price under this regulation you must have a pricing chart. * * * On or before October 15, 1944, every seller subject to this regulation * * * must file two signed copies of a pricing chart with the Office of Price Administration * * *. You must keep a copy of the pricing chart for your own use. * * *

(a) *How to prepare a pricing chart.* Each pricing chart must contain the following:

(1) The seller's name and address.

(2) Type of seller * * *.

(4) A list of the categories you delivered during your base period.

(5) A list of the cost prices at which you purchased garments in each of these categories. * * *

(6) The discount, terms of allowance at which you purchased the largest number of garments at each cost price listed in (5). * * *

(7) The selling price at which you delivered, during the base period, the largest number of garments of each cost price listed in (5). If during the base period you delivered

an equal number of garments at two or more different selling prices, list the lowest of these selling prices. * * * .

(8) The percentage markup taken on each selling price listed in (7).[2]

* * *

2. Any percentage markup authorized for a particular cost price and/or category by an order granting an adjustment under MPR 153, as amended, shall be deemed to be the percentage markup taken by the seller on the largest number of garments of that cost price and/or category delivered during the base period.

Selling price lines and percentage markups of sellers who made their first deliveries after June 15, 1942 may be revised at any time by the OPA * * *.

NOTE: Throughout this regulation, reference is made to categories, prices and markups listed on the seller's pricing chart. * * *

* * *

(b) How to amend a pricing chart. * * * However, until you have received an acknowledgment from the OPA of the receipt of this amended pricing chart, you must not take a higher percentage markup than that previously reported, or permitted under this regulation, whichever is lower.

SEC. 4. *Pricing rules.*—(a) *Summary of pricing rules.* In order to find your ceiling price for a garment, you use whichever of the four following pricing rules is applicable. * * *

(1) *Rules 1 and 2.* You first look at your pricing chart to find whether the category of garment which you are pricing is listed on the chart. If it is, you find your ceiling price by using Rule 1 or 2.

(2) *Rule 3.* If the category is not listed on your pricing chart you use Rule 3. * * *

(b) * * * (1) Rule 1. *Garments purchased at a cost price listed on the seller's pricing chart.* The ceiling price for a garment which has a cost to you the same as a cost price listed for that category on your pricing chart is the selling price listed for that cost price on your chart. * * *

(a) Rule 2. *Garments purchased at a cost not listed on the seller's pricing chart*—(i) *Garments purchased at a cost higher than any listed on the seller's pricing chart.* The ceiling price for a garment whose cost is greater than the highest cost price listed for the same category on your pricing chart is calculated by applying to the cost of the garment you are pricing the "average percentage markup" for that category. The "average percentage markup" is found by adding together all the cost prices listed for a category, adding together all the selling prices listed for that category, and then dividing the difference between these totals by the total of the selling price.

For example: The retailer whose pricing chart is shown in appendix B(a)(1) wishes to find his ceiling price for a woman's dress (Category 21) which he purchased for $12.75. Since the highest cost price listed for women's dresses on his pricing chart is $10.75, he must price under Rule 2(i). To find his average percentage markup for women's dresses he first adds together the cost prices listed for women's dresses (* * * $50.00); then he adds together the selling prices listed for those cost prices (* * * $79.68); next he subtracts the total of the cost prices from the total of the selling prices * * * finally, he divides the remainder just obtained by the total of the selling prices ($29.68 ÷ $79.68 = 37.2%). His average percentage markup is therefore 37.2%, and he finds that his ceiling price for his $12.75 cost dress is $20.30 by subtracting 37.2% from 100% * * * and dividing the cost by the remainder ($12.75 ÷ 62.8% = $20.30). Note that this retailer will use the same average percentage markup of 37.2% in pricing all women's dresses costing more than $10.75.

(ii) *Garments purchased at cost prices lower than any listed on the seller's pricing chart.* Your ceiling price for a garment whose cost is less than the lowest cost price listed on your pricing chart for the same category is calculated by applying to the cost of the garment you are pricing, the percentage markup listed on your pricing chart for the lowest cost price in that category. This is done by subtracting the percentage markup from 100%, and dividing the cost of the garment you are pricing by the difference. The result is your ceiling price. * * *

For example: You have some women's dresses (Category 21) that you bought for $2.75. During the base period you did not deliver any women's dresses costing less than $3.75. Your pricing chart shows you that the selling price at which you delivered the largest number of $3.75 dresses is $5.98. It also shows you that your percentage markup was 37.3%. By applying this same markup in pricing your $2.75 dresses, you find that your ceiling price is $4.39 * * *.

However, if you find that your $3.75 cost price for women's dresses is marked with an (S) you disregard the percentage markup listed for that cost price and find your ceiling price for your $2.75 dresses by applying the percentage markup listed on your pricing chart for the lowest cost price line of women's dresses not preceded by (S).

(iii) *All other garments purchased at cost prices not listed on the seller's pricing chart.* Your ceiling price for a garment whose cost is between the lowest and the highest cost price listed on your pricing chart for the same category, but is not the same as any cost price listed on the chart for that category, is calculated by applying to the cost of the garment you are pricing, the percentage markup listed on your pricing chart for the next lower cost price in that category. This is done by subtracting the percentage markup from 100%, and dividing the cost of the gar-

ment you are pricing by the difference. The result is your ceiling price.

For example: You want to find your ceiling price for women's dresses (Category 21) that you now buy at $7.75. On your pricing chart you have listed women's dresses at cost prices of $6.75 and $8.75, but none at $7.75. To calculate your ceiling price you take the percentage markup listed on your chart for women's dresses costing $6.75. This is 38.4%. You apply this markup to your cost of $7.75 and find that your ceiling price is $12.58 * * *.

(iv) *Adjustment of cost prices to reflect different terms or discounts.* Where you find that a garment which you now purchase has a different cost price from any garment of the same category listed on your pricing chart, and that you bought such garment on terms different from those listed for the next lower cost price on your pricing chart, you must adjust the cost of the garment you are now pricing to reflect the terms listed on your pricing chart for the next lower price, and then, using the adjusted cost, take the percentage markup of the next lower cost price.

For example: The retailer whose pricing chart is shown in Appendix B (a) (1) listed the following cost prices for women's coats: * * * Therefore, in pricing his woman's coat purchased at $19.75 less 3/10 EOM under Rule 2(iii) the seller uses the percentage markup on his next lower cost price. * * * Applying the percentage markup listed for $18.75 cost price (37.4%) to the woman's coat with an adjusted cost of $19.35, he finds that $30.91 is his ceiling price * * *.

(1) **Rule 3.** Your ceiling price for a garment in a category not listed on your pricing chart is calculated by applying Rules 1 and 2 above as if all the cost and selling price lines and percentage markups listed on your entire pricing chart were the price lines and markups for the cate-

gory of garment you are pricing. * * * However, in using Rule 2(i) in such case, you use the average percentage markup for all categories, found by totalling all the cost prices for all categories, and all the selling prices for all categories listed on your pricing chart. Note, also, that in using Rule 2 (iii) you use the percentage markup listed for the cost price next lower than the cost of the garment you are pricing, regardless of category, and in using Rule 2 (ii) you use the percentage markup listed on the chart for the lowest cost price in any category.

For example: You want to find the ceiling price for misses' suits (Category 7) which you now buy at $9.25. You did not list any misses' suits on your pricing chart nor did you list a cost price of $9.25 for any category at all. You did list a cost price of $8.75 for women's dresses (Category 21) which is the next lower cost price listed on your pricing chart for any category. Your pricing chart shows a percentage markup of 37.3% for these $8.75 women's dresses, since the selling price is listed at $13.95. Accordingly, your markup for your $9.25 misses' suits is 37.3%, and your ceiling price is $14.75 * * *.

However, in applying this rule you may find that you have listed the same cost price for more than one category, and that the selling prices and percentage markups listed for that cost price are different for the several categories. In any such case, you must, when applying this rule, use the selling price or the percentage markup which gives you the lowest ceiling price.

For example: In the preceding example you might have found, when pricing the misses' suits which you now buy at $9.25, that on your pricing chart you listed a cost price of $8.75 for both women's dresses (Category 21) and women's coats (Category 1), but that you listed a percentage markup of 32% on the coats and a

percentage markup of 37.3% on the dresses. Using the 32% markup for your $9.25 misses' suits, you would have a ceiling price of $13.60 ($9.25 ÷ 68% = $13.60). If you could use the 37.3% markup, your ceiling price would be $14.75 ($9.25 ÷ 62.7% = $14.75). However, you must take the percentage markup which will give you the lowest ceiling price. This is 32%, and your ceiling price for your $9.25 misses' suits is therefore $13.60.

* * *

SEC. 7. *Records.* (a) You must keep a record showing, for each price established under this regulation, (1) the cost of the garment, (2) the selling price, (3) if you did not price under Rule 1, the percentage markup used in establishing the ceiling price, and (4) the pricing rule under which the ceiling was calculated.